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# In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1,464.

UNITED MINE WORKERS OF AMERICA,
*Petitioner,*

v.

BLUE DIAMOND COAL COMPANY, a corporation,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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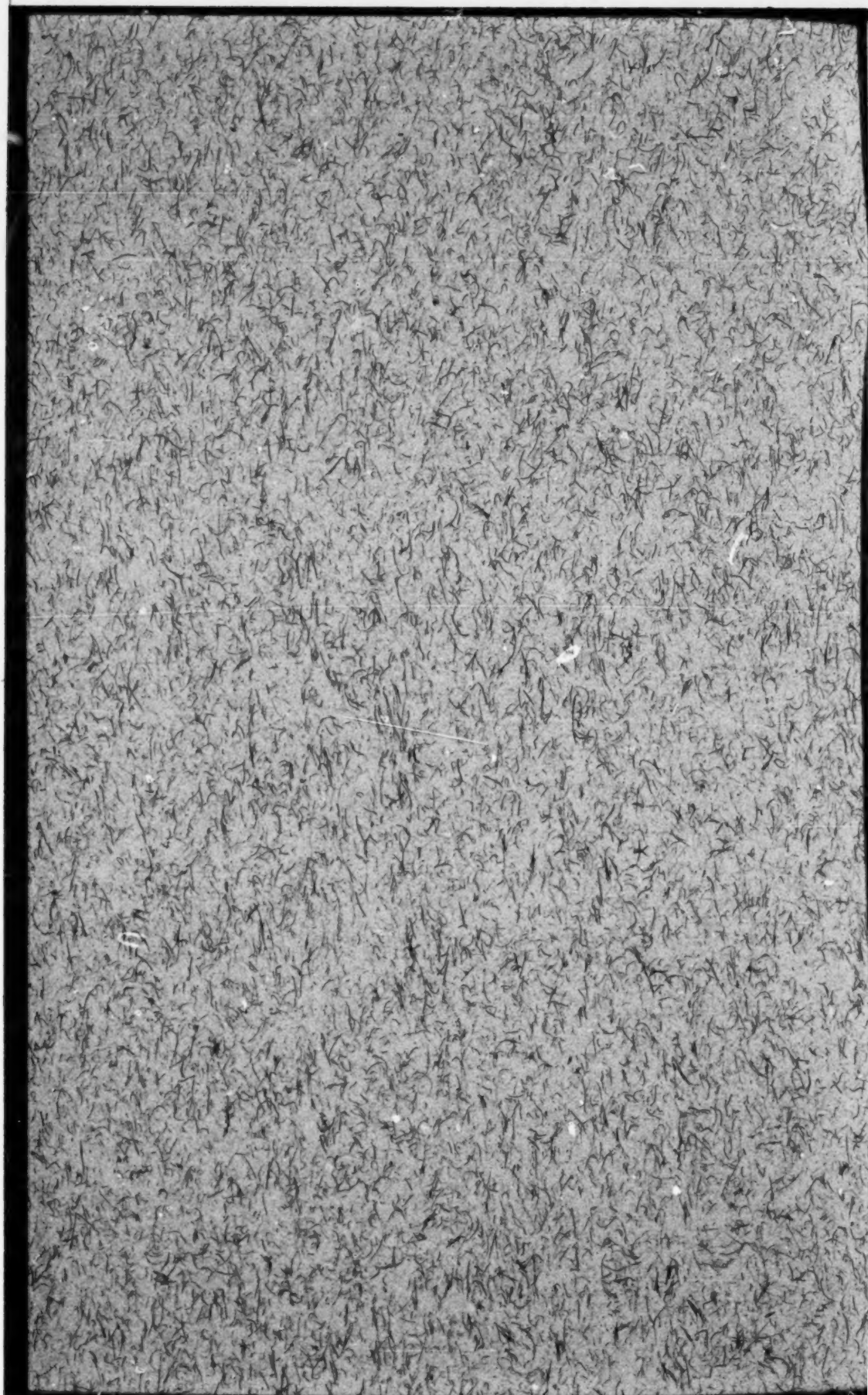

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## BRIEF FOR RESPONDENT IN OPPOSITION.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Respondent, Blue Diamond Coal Company, a corporation, in opposition to the petition for writ of certiorari filed herein, respectfully represents:

## OPINION BELOW.

The opinion of the Sixth Circuit, below, is reported in 436 F.2d 551.

## QUESTIONS PRESENTED.

1. Will certiorari be granted to enable this Court to review and evaluate conflicting evidence presented in the trial court, and to decide factual issues, de novo, based upon that review and evaluation?

2. The trial court and the appellate court having considered the union's complaints as to instructions, and having found that no prejudicial error was committed, is the union's continuing complaint of errors in instructions of such public concern as to warrant the granting of certiorari and further review by this Court?

3. Will certiorari be granted to reconsider the now well established rule that a strike to resolve a dispute made arbitrable by contract is a breach of that contract?

## STATEMENT OF THE CASE.

Scattered throughout the petitioner's Statement of the Case is a recital of alleged facts, often inferred to be, and sometimes alleged to be "uncontradicted."

Feeling that there are inaccuracies and omissions in the petitioner's Statement, the respondent would respectfully direct the attention of the Court to some additional facts related by the Court of Appeals (A. 10a-15a),[1] to which the respondent has appended record references for a test of accuracy:

"The evidence showed that for some five years prior to February, 1962, there had been but one work stoppage by Blue Diamond employees at Leatherwood No. 1. That occurred in 1959 when its employees joined other miners for two days in picketing non-union mines (T. 61). Contrasted with this experience, commencing in February, 1962, and continuing into January, 1963, Blue Diamond was harassed by work stoppages in the commencement and continuance of which the officers of the International allegedly played such a part as amounted to breaches of the union's contract with Blue Diamond (T. 63, 67 et seq.).

* * * * *

"Across the hollow from Leatherwood mine No. 2 was a mine owned by Blair Fork Coal Company, a subsidiary of Blue Diamond (T. 65-66). On February 5, 1962, the UMW filed with the National Labor Relations Board a charge, signed by Bill Perkins, asserting that Blair Fork Coal Company was encouraging its employees to join the Southern Labor Union, a rival of UMW (T. 799). On February 28, 1962, Beane, District President of UMW, talking to the man in charge of Blue Diamond's labor

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[1] The respondent is adopting the system of reference adopted by petitioner as set forth on page 2 of the petition.

relations, said that he, Beane, wished to cooperate with Blue Diamond, but if he ever found out that Blue Diamond was involved in the Blair Fork Coal Company mine, he did not know whether or not there was going to be any further cooperation between the Union and Blue Diamond (T. 65).

"Another witness for the company who heard Beane's statement of February 28, 1962, gave this recital of them:

> " 'He stated that there had been cooperation between the U.M.W. and Blue Diamond Coal Company, but he had heard rumors to the extent that Blue Diamond Coal Company had acquired some adjacent property, Blair Fork by name; and that they were attempting to run it as a scab mine or something of that nature. He said he was checking into this and if he found out that it was so that all cooperation would cease, and he stressed again that he was looking into it and intended to find out'." (T. 113)

* * * * *

"Thereafter, on May 21, 1962, one John Slyger, a loading operator at Blue Diamond's Leatherwood No. 1 mine, refused to operate a loader without a helper and was discharged (T. 67-68). A general strike at Leatherwood No. 1 followed on May 22 and 23 (T. 67). Thereafter, the men returned to work and the initial steps of the grievance procedure were taken to resolve the validity of Slyger's discharge (T. 69). On May 28, representatives of the union and the company met as the third step of the procedure. Perkins, representative of the International for District 30, came to the meeting accompanied by the local union's mine committee and its President. Upon his arrival, Perkins said to the company representatives, "I can save a whole lot of time if you will answer one question for me * * *. Are you going to put him [Slyger] back to work?" Upon receiving a negative reply, Perkins,

with the mine committee and President, left without further discussion (T. 69). A general strike followed the next morning, May 29, and continued through five days, ending on June 4 (T. 70).

"On August 20, 1962, Perkins was again present at a meeting which included representatives of the local union, as well as the company representatives (T. 70). There was a discussion relative to shift seniority. Perkins was described as being in an angry mood, and asked the company people, "Where is your chain?" This question was apparently prompted by the fact that at a mine known as the Scotia Coal Company mine, owned by Blue Diamond, Perkins was frustrated in his efforts to organize the miners there employed by a chain across the mine's entrance. The personnel director of Blue Diamond gave this account of the additional remarks of Perkins:

> 'I didn't say anything and we went on in the meeting and he kept talking and he said that in the past he had instructed the Committee and the men there to cooperate with us and to work overtime when we needed it, but since we wouldn't let him go in on the property over at our Scotia Coal Company mine above Cumberland to organize the men that he was instructing the Committee right then and there in front of us that there wouldn't be no more overtime work and there would be no more cooperation and he said, "It looks like it is going to be a fight to the finish, and we are going to go down fighting." And Mr. Sheets asked him if not working overtime wasn't against the contract, and he said, "To hell with the contract." ' (T. 70-71)

"Another company representative told it this way:

> 'He [Perkins] was real angry and he asked us as we went into the office, "Where in the H--- the chains were" and I didn't know what he was talking about and he said all he had been able to do for some time

was to get chains and guards; that he had been to this property that we owned and had tried to get in on this property and organize the men there and talk to them, and he said he hadn't even had a chance to get on the property to talk to them and he was extremely angry about it. He said if that was the attitude that the Company was going to use, that he wanted us to know there and then that there would be no more cooperation from the U.M.W. He said at one time that he had instructed the tipple especially to work overtime in order to help us out and asked the men to work overtime to help us out; but he said, "I want you to know that has ended," and he instructed the Mine Committee and the Local officers that were there in my presence and told them—he said, "From now on, there will be more (sic) overtime work at this mine. I want that understood." And he turned to me and said, "If you fire one of these men for this," he said, "We will strike." And I asked him, I said, "Mr. Perkins, isn't this against the contract?" And he said, "To hell with the contract," and with that the meeting was terminated.' (T. 118)

"Following the August 20 meeting, just described, there was a one-half day work stoppage on August 24, 1962 (T. 71).

* * * * *

"On October 1, 1962, there was another work stoppage for a single day, apparently because of work performed by a foreman (T. 72).

* * * * *

"Beginning on December 3, 1962, there was another strike lasting five days (T. 73). Following this, there was a work stoppage beginning January 8, 1963, which lasted through fourteen working days (T. 73-74). These work stoppages were allegedly the result of the workers at Blue Diamond's Leatherwood No. 1 mine refusing to cross

picket lines thrown about that mine by so-called roving pickets, miners who had been employed at Blue Diamond's Leatherwood Mine No. 2. This activity followed Blue Diamond's cancellation of its contract with UMW covering its employees at Leatherwood Mine No. 2. There was evidence to resist Blue Diamond's cancellation of the contract at Leatherwood No. 2, employees there would come over and picket Leatherwood No. 1, whose men would not cross the picket line thrown up by Leatherwood No. 2 miners. The No. 1 miners would then go over and picket mine No. 2 (T. 242, 284-285). There was evidence that during this activity Perkins, very much in evidence, was talking to the pickets and otherwise participating in what was going on (T. 210-211). He testified that he attempted to get the employees of No. 1 to go back to work. However, there was evidence by former members of the UMW who had taken part in these strikes that Perkins would say to the strikers, "My job is to tell you fellows to go back to work" (T. 231), but this would be coupled with the further advice that, "You could read between the lines" (T. 209, 240-241). A variation of this was that they—the strikers—"ought to know what to do" (T. 231). Miners giving this testimony emphasized that the statements of Perkins were understood as suggestions that the miners should continue their strike or at least that Perkins would go along with it (T. 231, 241). One witness put it this way when asked the meaning of Perkins' "you know what to do." "Meant I didn't work, stayed on strike" (T. 274).

## THE ARGUMENT.

### 1.

**Will certiorari be granted to enable this Court to review and evaluate conflicting evidence presented in the trial court, and to decide factual issues, de novo, based upon that review and evaluation?**

Somewhat dispersed, but comprising more than one-half the petition for certiorari, is the contention that there was no evidence upon the trial to support the verdict and judgment rendered and entered in the trial court. This is presented in a number of assertions, among them: The testimony for respondent was disputed by "uncontradicted" evidence; the petitioner did not participate in the strikes at the respondent's mine; the strikes were "wildcat" ones, involving no obligation to resort to grievance procedure; and, local officers and representatives were not the "agents" of the petitioner.

As heretofore pointed out, there was considerable evidence in contradiction of these contentions.

In 1925, in the case of *United States v. Johnston,* 268 U.S. 220, 227, this Court, through Mr. Justice Holmes, declared:

> "We do not grant certiorari to review evidence and discuss specific facts."

In *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178, a suit involving infringement of patents, this Court said: "Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

In *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 312 U.S. 592, *Kennedy v. Silas*

*Mason Co.*, 334 U.S. 249, and in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, this Court expressed its caution and reluctance in the realm of fact finding, and with a passing remark in *Thomas v. State of Arizona*, 356 U.S. 390, 393 it recognized the continuing validity of "the traditional jury function." In *Thomas* it was also said, "Whatever the merits of this dispute, our inquiry clearly is limited to a study of the *undisputed* portions of the record." (356 U.S. 402).

Though never specifically overruling *United States v. Johnston*, by the time the Court reached *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 and *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U.S. 107, the Court was obviously divided in opinion as to departure from the general principle laid down in *Johnston*.

In *Rogers*, an action under the Federal Employers' Liability Act, a jury awarded damages to the plaintiff. The Supreme Court of Missouri reversed on the grounds that the evidence did not support the verdict. After granting certiorari, a majority of this Court reached the conclusion that there was evidence sufficient to support a finding for the plaintiff, and that the Missouri Court had been in error in its reversal. Mr. Justice Frankfurter dissented, alluding to *Johnston*, and saying (352 U.S. 537) "The rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court, and is as equally applicable to negligence cases as to any other type of case." Mr. Justice Harlan concurred in the view that certiorari should not have been granted, but was of the opinion that, since the writ had been issued, it became the duty of the Court to inquire into the merits of the case.

*Sentilles* was an action by a seaman against a ship owner, and was predicated on the Jones Act. A jury

rendered a verdict for the plaintiff. The Court of Appeals felt that the evidence did not justify the jury's conclusion, and therefore reversed. A majority of this Court, after reviewing the evidence, decided that the Court of Appeals was in error. In the opinion it was said (361 U.S. 110):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Even with a Court divided in opinion, neither position is of any comfort to the petitioner here. It appears to be the opinion of some of the members of the Court that certiorari should not be granted at all for the mere purpose of reviewing evidence and finding facts. This postulate does nothing for the petitioner. Other Justices feel that some cases justify a review of the evidence and that a jury should be permitted "to select from among conflicting inferences and conclusions that which it considers most reasonable." Neither would this conviction justify the granting of certiorari in the present case, where, as pointed out, conflicting evidence could justify conflicting inferences and conclusions.

The petitioner suggests that "when there is a complete absence of probative facts to support the conclusion reached" by the jury, reversible error exists. This sug-

gestion will not bear analysis. Mr. Beane was "President and International Board Member of the United Mine Workers, District 30 (T. 338). The officers of District 30 were appointed by the International Union (T. 338). In 1962, Mr. Bill Perkins was "an International Representative assigned to District 30" and he was the only one in the District (T. 339). The International Union was supreme, and its policies prevailed over those of the District (T. 339-340). Both Mr. Beane and Mr. Perkins were paid by the International Union (T. 349). Mr. Perkins was dispatched, as a representative of the International Union, to consult with and advise the employees regarding strikes (T. 350).

It was denied, of course, but there was proof that Mr. Beane threatened the respondent with trouble (T. 65, 113); that trouble promptly followed (T. 67 et seq.); that Perkins was on the scene much of the time (T. 63, 69, 70, 207, 210-211); that he gave the employees a tongue-in-cheek admonition to go to work, coupling it with statements to the effect that they could "read between the lines" (T. 207) or that they "ought to know what to do" (T. 231). Similar evidence in *Lewis vs. Benedict Coal Corporation,* 259 F.2d 346, 351-352; 361 U.S. 459, 464 (affirmed on a divided Court) was considered sufficient to form a jury issue.

2.

**The trial court and the appellate court having considered the union's complaints as to instructions, and having found that no prejudicial error was committed, is the union's continuing complaint of errors in instructions of such public concern as to warrant the granting of certiorari and further review by this Court?**

The Union's complaint about the trial court's refusal to give its offered instructions 1 and 4 (that the strikes were not a violation of the agreement) is based entirely upon its untenable contention as to the applicable law, and this contention is answered in the argument under Question 3 herein.

Its complaint as to the refusal of the trial court to give its offered instruction on "preponderance of the evidence" is fully answered by the Sixth Circuit, both in the opinion of Senior Circuit Judge O'Sullivan, and the concurring opinion of Circuit Judges McCree and Celebrezze (A. 23a-27a, 28a-29a).

Judge O'Sullivan reached the conclusion that, since the requested instruction is not required by the United States Constitution, or by any act of Congress, including the Labor Management Relations Act of 1947, it was proper for the trial court to instruct the jury on plaintiff's burden under the Kentucky rule (A. 26a-27a). Judge O'Sullivan also pointed out that "telling a jury, 'If you believe from the evidence' may actually require a greater burden of proof than 'by a preponderance of the evidence,' " and concluded that "the difference between Kentucky's rule and the more conventional style of instruction is not such that the use of the Kentucky style in this case denied appellant any 'substantial right.' " Also noteworthy is the fact that the trial court also told the jury

"unless you so believe the defendant Union breached its contract, you should find for the defendant," thus stressing the necessity of conviction "from the evidence" (T. 1191).

Judge McCree, in his concurring opinion (joined by Judge Celebrezze) also concluded "that the court below did not prejudice appellant by using the Kentucky burden of proof jury instructions. The requirement that the jurors 'believe from the evidence' in effect requires that they be persuaded by the weight of the evidence" (A. 29a).

The other instructions, given or refused, of which complaint is made by the Union, relate entirely to the evidence in this particular case.

The Union complains of error in the trial court's rejection of its proffered instructions 2 and 3, which would have told the jury that the Union was not liable for its member's acts merely by virtue of membership, or for spontaneous and wildcat strikes. In truth, the complaint of the Union is not that this point was not covered in the instructions of the trial court, but that the trial court failed to adopt the exact language used in the offered instructions. In the Sixth Circuit opinion, a portion of the trial court's instructions covering this point are quoted and approved as being adequate (A. 9a, 23a). This quotation is taken from the following portion of the instructions on the issue of agency and responsibility of the Union (T. 1191-1193):

> "With respect to the responsibility of the International Union for the acts of its representatives and officers, you are instructed that a labor union can [1192] act only through its officers and agents and it is only responsible for the acts by its officers and agents done within the scope of their authority or employment.
>
> "An agent is one who, by the authority of his principal, transacts his principal's business, or part

of it, and represents his principal in dealing with third parties. This fact of agency must be proved by the evidence the same as any other fact in the case.

"This suit is against the United Mine Workers of America. The local union is not a party to the contract, nor is it being sued in this action. Defendant United Mine Workers of America would not be liable for the action of the officers or individual members of the local union unless it is shown the United Mine Workers of America authorized, participated in, or ratified the acts of the local union or individual members after express knowledge of such acts, which are claimed to be violations of the contract.

"You should not infer ratification by United Mine Workers of any work stoppage on the part of the local union from the fact that defendant United Mine Workers of America involved itself in the dispute giving rise to such stoppage after it occurred. National labor policy requires that national unions be encouraged to exercise a restraining influence on [1193] strike situations and they should not be made liable for such harm as may already have been done."

The Union complains of error in the trial court's rejection of its proffered instruction 8, under which the jury would have been specifically told that remote, uncertain or speculative damages could not be recovered. This claim of error is specifically dealt with in the Sixth Circuit opinion, wherein it is pointed out that the trial court, in its charge, limited the damages recoverable to such as the jury should believe from the evidence were suffered by Blue Diamond "as a direct result of the defendant's breach of the contract as above conditioned and described" and that if the jury believed Blue Diamond entitled to recover on its claim for loss of production by reason of the strikes referred to in the evidence, then the jury should award it "such a sum in damages as you may

find from the evidence will fairly and reasonably compensate plaintiff for the loss of profits it is reasonably certain it would have made in its coal mining operation but for the occurrence of said strikes" (A. 22a). The court concluded "that the jury was correctly instructed on the matter of damages" (A. 22a).

The language of a charge is for the trial court to determine and, if, from the entire charge, the language used conveys to the jury in clear and correct fashion the applicable law, that is all that is required. *United States v. Trenton Potteries Company,* 273 U.S. 392, 396; *Shaw v. Lauritzen,* 3 Cir., 428 F.2d 247, 251; *Nowell v. Dick,* 5 Cir., 413 F.2d 1204, 1211; *James v. Continental Insurance Company,* 3 Cir., 424 F.2d 1064, 1065. The District Court and the Sixth Circuit, in fully reviewing the Union's complaint of errors in the instructions, found that the charge of the trial court in this case satisfied the requirements of this test.

3.

**Will certiorari be granted to reconsider the now well established rule that a strike to resolve a dispute made arbitrable by contract, is a breach of that contract?**

In *Lewis v. Benedict Coal Corporation,* 259 F.2d 346, it was held that a strike to resolve a dispute made arbitrable by contract constituted an actionable breach of contract. That holding was affirmed upon an equally divided Court (361 U.S. 459). In the course of that litigation it was urged that inasmuch as "no strike" and "penalty" clauses had been removed from previous contracts, those deletions established an unfettered right to strike, even though the contract provided for a resolution of all disputes by procedures involving arbitration. Overruling

that contention, it was held "that a strike to settle a dispute which a collective bargaining agreement provided shall be settled by an exclusive and obligatory alternative procedure constitutes a violation of the agreement." (259 F.2d 351).

The same question and the same contention was presented in *Local 174, Teamsters etc. v. Lucas Flour Company,* 369 U.S. 95. It was there said (369 U.S. 104-105):

> "Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> "The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. W. L. Mead, Inc., 113 N.L.R.B. 1040. We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."

This Court repeated this principle in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770,* 90 S. Ct. 1583, 1591 (____ U.S. ____). In this case the Court re-affirmed the holding thus:

"As we have previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration."

In a footnote, the Court observed:

"We held in Local 174, Teamsters, etc. v. Lucas Flour Co., *supra,* that, even in the absence of an express no-strike clause in the collective bargaining contract, an agreement that certain disputes 'will be exclusively covered by compulsory terminal arbitration' (369 U.S., at 106, 82 S. Ct., at 578) gives rise to an implied promise by the Union not to strike during the term of the contract in response to these arbitrable disputes."

The petitioner is now saying that this Court and all of the lower courts have been wrong about this proposition all along, and in support of its contention, it refers to *National Labor Relations Board v. Lion Oil Co.,* 352 U.S. 282, and to *Garmeada Coal Co. v. International Union, UMWA,* 230 F.2d 945.

*Lion Oil* was not the same sort of case. That action involved an inquiry as to whether or not a strike following the expiration of a sixty-day notice of a desire to modify a contract, but prior to the terminal date of the entire contract, constituted an unfair labor practice as a violation of Section 8(d)(4) of the National Labor Relations Act. Aside from the fact that *Benedict* and *Lucas* followed this case, it might be noted in passing that in *Lion* the Court adhered to the proposition that a refusal to work "midway in a fixed-term contract which did not provide for modifications during its term" justified an employer "in discharging the employees."

In *Garmeada,* tried without a jury, the trial court found, from conflicting evidence, that the union did not

instigate nor prolong the strike. In this case, upon conflicting evidence, the jury found to the contrary.

Petitioner lays some stress upon the fact that the 1950 Wage Agreement was amended in 1952 by expunging the provision that stoppages were to be "settled and determined *exclusively* by" the grievance procedures. This emphasis could lead to the erroneous impression that the wage agreement in *Benedict* was different from the wage agreement now under consideration.

The pertinent provisions of the wage agreement in *Benedict* were precisely the same as in this litigation, as may be seen by examining the footnote to *Benedict* (259 F.2d 350) and page 46a of the appendix to the petition for writ of certiorari. In fact, petitioner concedes this to be true (petition, p. 31).

## CONCLUSION.

The respondent believes itself entitled to a denial of the Petition for Writ of Certiorari herein presented.

Respectfully submitted,

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